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No. 02-64

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL JOSEPH MCGOWAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent has provided no persuasive reason for this Court to leave unreviewed the Ninth Circuit's "general rule" (Pet. App. 6a), which conflicts with the decisions of other circuits, that expert testimony concerning the compartmentalized structure and modus operandi of drug-trafficking organizations is inadmissible in simple drug-importation prosecutions. That evidence is important in helping the jury understand an activity—drug smuggling—that is foreign to most jurors, and provides a context for the jury to evaluate other evidence, as well as gaps in evidence. The Ninth Circuit's categorical exclusion of that evidence already has resulted in the reversal of numerous convictions, and it warrants this Court's review.[1]

A. The Ninth Circuit Categorically Excludes The Expert Testimony At Issue. Respondent asserts that the Ninth Circuit has not established a "categorical bar" to admission of the type of expert testimony at

[1] Respondent has filed a conditional cross-petition for certiorari (No. 02-5976), raising two questions involving the constitutionality and interpretation of 21 U.S.C. 952 and 960 in light of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). The government has filed a separate opposition to that cross-petition.

issue. Br. in Opp. 12; see *id.* at 10, 12-13, 28-29. That argument is contradicted by the Ninth Circuit's own decisions, not to mention the demonstrable impact that the rule of *United States* v. *Vallejo*, 237 F.3d 1008, amended, 246 F.3d 1150 (2001), already has had on drug-importation convictions in that circuit. See Pet. 9 (citing cases in which the Ninth Circuit has reversed convictions under *Vallejo*).

As explained (Pet. 8-9), in *Vallejo*, the Ninth Circuit unequivocally held that expert testimony "concerning the structure and modus operandi of drug trafficking organizations" is not relevant in a simple drug-importation prosecution brought under 21 U.S.C. 841(a)(1), 952, and 960, and that such testimony is "unfairly prejudicial." 237 F.3d at 1017. The Ninth Circuit panel in this case plainly grasped the categorical nature of that "general rule." Pet. App. 6a ("[N]one of the reasons given by the district court remove this case from *Vallejo*'s general rule."). So too, the Ninth Circuit's discussion of *Vallejo* in *United States* v. *Pineda-Torres*, 287 F.3d 860, 863-866 (2002), petition for cert. pending, No. 02-112 (filed July 22, 2002), underscores the general applicability of *Vallejo*'s prohibition.[2]

Respondent notes that in both *Vallejo* and this case, the Ninth Circuit faulted the government for not establishing a specific evidentiary link between the defendant and a particular drug-trafficking organization. See Br. in Opp. 12, 16-17; Pet. App. 5a ("Neither Vallejo,

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[2] On July 22, 2002, the government filed a petition for a writ of certiorari in *Pineda-Torres* (No. 02-112) presenting the same question as the petition in this case. The petition in No. 02-112 asks the Court to hold the case and dispose of it in light of the disposition in this case. On September 13, 2002, the Clerk directed the respondent in No. 02-112 to file a response to the petition on or before October 15, 2002.

nor McGowan, was charged with conspiracy, and in neither case did the government introduce any evidence establishing a connection between the defendant and a drug trafficking organization.") (citing *Vallejo*, 237 F.3d at 1015). But respondent fails to account for the fact that—given the compartmentalization in functions in drug-trafficking organizations, see Pet. App. 37a-38a—such evidence is generally *unavailable* to the government in a simple drug-courier prosecution such as this case and the others in which the Ninth Circuit has applied its *Vallejo* bar. The result is that the gov ernment typically will be unable to supply the evidentiary prerequisite—*i.e.*, evidence linking the defendant to a particular drug-trafficking organization—necessary, in the Ninth Circuit alone, to present a jury with the type of expert testimony at issue.

Respondent claims that decisions such as *United States* v. *Valencia-Amezcua*, 278 F.3d 901 (2002), show that the Ninth Circuit has "rejected challenges to *modus operandi* testimony." Br. in Opp. 14. *Valencia-Amezcua*, however, does not fit the common fact-pattern in which the Ninth Circuit applies "*Vallejo*'s general rule." Pet. App. 6a. *Valencia-Amezcua* did not involve a drug-importation prosecution, but rather a prosecution for illegally manufacturing and possessing methamphetamine. See 278 F.3d at 905. As explained in the petition (Pet. 9), the Ninth Circuit has been unwavering in its application of its *Vallejo* rule to exclude the expert testimony at issue in simple drug-importation prosecutions such as this, by far the most common type of drug prosecution in border districts in the Ninth Circuit like the Southern District of California. See Pet. 20.

B. This Case Is Well-Suited To Address The Question Presented. Respondent states (Br. in Opp. 13) that this case is not a "proper vehicle" in which to consider the validity of "*Vallejo*'s general rule" (Pet. App. 6a). That is incorrect. The question presented is squarely and properly presented by his case, as adequately evidenced alone by the fact that the Ninth Circuit applied its *Vallejo* rule to reverse the convictions in this case. See *id.* at 5a-7a.

Nor is respondent correct in suggesting that the record fails to support the government's challenge to the *Vallejo* rule. See Br. in Opp. 13-14. As explained in the petition (Pet. 3), the government sought to introduce the expert testimony at issue to "give a context to the situation of what is actually occurring" in order to "help[]" the jury understand "the smuggling activity itself," as well as to help explain "why taking fingerprints is not necessarily helpful in this type of case." Pet. App. 11a. The district court allowed the evidence for those purposes, stating, *inter alia*, that the evidence at issue is "important for the jury to understand how the systems works," as well as why there may not be "evidence that shows [that the defendant] touched the drug" or "loaded the drug." *Id.* at 15a-16a; see *id.* at 16a ("[The evidence] helps th[e] jury understand something that they don't know about."). And the expert testimony that was presented at trial by Special Agent Villars served those functions. See *id.* at 29a-53a.

Respondent argues that there is "no justification" for the expert testimony at issue to explain the lack of fingerprints because, he asserts, the government's own expert testified that gasoline would "destroy[] any fingerprint evidence." Br. in Opp. 14. Special Agent Villars, however, testified that there were "several reasons" why fingerprint evidence is not helpful in a

case such as this. Pet. App. 36a. In particular, he testified not only that it is difficult to lift prints from the packaging normally used to transport drugs across the border, especially when it is placed in gasoline, but also that "the person who normally loads the vehicle is not the person who drives it." *Id.* at 36a-38a. The compartmentalization testimony was key because, as Special Agent Villars emphasized, it means that "*if we were able to lift a print*, it would be of somebody south of the border." *Id.* at 36a (emphasis added). That is important to know because in most simple drug-importation cases in which drugs are secreted in a car, including this one, the government does not even attempt to recover fingerprint evidence from the packaging containing drugs or the vehicle itself for that very reason.

In any event, even if respondent's characterization of the Villars testimony were correct, the testimony is still relevant and admissible to provide the jury with an understanding of how drug-smuggling operations work. That understanding is critical to enhance the jury's evaluation of the evidence presented at trial, as well as to explain possible gaps in such evidence, and the arguments made by both sides concerning whether someone who is stopped at the border with drugs in his car but claims no knowledge of the drugs could still have "knowingly" sought to import them into this country. As explained (Pet. 13), the testimony is not introduced as an implicit statement that persons such as respondent *are* drug couriers, but only that they *might* be, even though the defendant claims no knowledge of the drugs in his car and there is not more physical evidence linking the defendant to the drugs. A jury is left to

draw its own conclusion based on inferences that it may reasonably draw from the evidence.[3]

C. The Circuit Conflict Is Genuine. Respondent attempts to reconcile "*Vallejo*'s general rule" (Pet. App. 6a) with the decisions in other circuits that have allowed the sort of expert testimony categorically barred by the Ninth Circuit, asserting that "not a single case cited by the Solicitor General conflicts with *Vallejo*." Br. in Opp. 14. That argument cannot be squared with the case law discussed in the petition (Pet. 16-19), in which courts of appeals outside the Ninth Circuit have readily allowed expert testimony concerning the structure and modus operandi of drug-trafficking organizations in similar drug-smuggling prosecutions. Indeed, later in his opposition, respondent himself acknowledges that there is "tension" between the cases discussed in the petition and on which he now relies. Br. in Opp. 30.

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[3] Respondent states that the government "appears to concede that no affirmative mention of fingerprints was made until after Agent Villars testified on direct." Br. in Opp. 11 n.4. As noted (Pet. 7 n.3), however, respondent's counsel laid the groundwork for an argument based on the absence of fingerprints when she asked Inspector Williams—before Special Agent Villars took the stand —whether he "use[d] gloves" when he removed the drugs from respondent's vehicle. 8/29/00 Tr. 245. In any event, the government's ability to inform jurors about the structure and modus operandi of drug-trafficking organizations should not turn on a *defendant's* decision whether to point to the lack-of-fingerprint evidence. Among other things, as this case illustrates, defense counsel may allude to the lack of fingerprints, while maintaining that the defendant has not affirmatively raised such a defense. In addition, even when a defendant makes no reference to the lack of fingerprints or other physical evidence tying him to drugs found in his car, a jury on its own may well draw a negative inference from the fact that the government did not present such evidence. See Pet. 11.

Respondent claims (Br. in Opp. 28) that there is no conflict because the cases from other circuits do not focus on the need for the government to show a link between the defendant and a particular drug-trafficking organization as a prerequisite to introducing the type of expert testimony at issue. It is true that the cases do not focus on, or require, such a link. But far from dispelling the conflict, the fact that the other circuits have not adopted such an evidentiary prerequisite further underscores the novelty of the Ninth Circuit's *Vallejo* rule.

For example, in *United States* v. *Foster*, 939 F.2d 445 (1991), the Seventh Circuit did not focus on whether the government had shown that the defendant was tied to a specific drug-trafficking organization. Rather, in upholding the trial court's admission of the modus operandi expert testimony at issue, the court emphasized that the testimony was relevant and admissible to place the evidence "in context" for the jury, and "to offer another explanation for [seemingly innocent] behavior." *Id.* at 451-452. So too, in *United States* v. *Chin*, 981 F.2d 1275, 1279 (1992), cert. denied, 508 U.S. 923 (1993), the D.C. Circuit did not suggest that the admissibility of expert testimony on drug-trafficking operations is contingent on establishing that the defendant belongs to a particular drug-trafficking organization, but instead recognized that such evidence "is 'commonly admitted.'" In the Ninth Circuit, by contrast, such expert testimony is not admissible in a drug-importation prosecution unless the government establishes an evidentiary link between the defendant and a particular drug-trafficking organization.[4]

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[4] *United States* v. *Long*, 917 F.2d 691 (2d Cir. 1990), relied upon by respondent (Br. in Opp. 28), does not support the Ninth Circuit's *Vallejo* rule. *Long* involved a RICO prosecution against

Respondent's reliance on cases barring the admission of "'drug-courier profile' evidence" is misplaced. Br. in Opp. 29; see *id.* 29-30. As explained (Pet. 15 n.6), although it can take different forms, so-called drug-courier profile evidence typically is used to link characteristics of the defendant to a generalized profile of drug couriers used in investigations and to argue, based on that comparison, that the defendant is guilty. For example, in *United States* v. *Brito*, 136 F.3d 397, 412 (5th Cir.), cert. denied, 523 U.S. 1128 (1998), relied upon by respondent, the witness "described a profile of family drug organizations and then compared the [defendants'] actions to that profile." The court of appeals held that "[t]his type of profile evidence is inadmissible to prove substantive guilt based on similarities between defendants and a profile." *Ibid.* By contrast, the type of expert testimony at issue in this case is not introduced to compare a defendant to an investigative profile of known criminals, but instead, *inter alia*, to provide the jury with a general understanding of a trade about which jurors usually lack familiarity and a context in which to evaluate the evidence, as well as possible gaps in evidence, at trial.[5]

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teamsters officials with organized crime contacts. The Second Circuit held that the trial court improperly admitted certain expert testimony concerning "organized crime." *Id.* at 701. But far from adopting the sort of *categorical* prohibition established by the Ninth Circuit in *Vallejo*, the Second Circuit in *Long* carefully grounded its decision in the particular circumstances of that case, including its determination that there was "no need to call an expert to explain [how organized crime families operate]" when one of the fact witnesses, a member of an organized crime family, could have provided such an explanation. *Id.* at 702.

[5] The other drug-courier profile cases cited by respondent are similarly inapposite. See, *e.g.*, *United States* v. *Jones*, 913 F.2d 174, 177 (4th Cir. 1990) (drug-courier profile evidence was erroneously

Respondent claims that the petition in this case "jump[s] the gun," because other circuits have not explicitly rejected *Vallejo*. Br. in Opp. 28. As discussed (Pet. 16-19), however, the *Vallejo* rule is clearly out of step with the decisions in other circuits concerning the admissibility of expert testimony on the structure and modus operandi of drug-trafficking operations. Moreover, certiorari is warranted based on the immediate and serious impact that the *Vallejo* rule has had in the Ninth Circuit—home to the Nation's busiest ports of entry with Mexico—on the government's effort to stem the tide of illegal drugs being smuggled into this country. Cf. *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989) ("We grant certiorari to review the decision of the [Ninth Circuit] because of its serious implications for the enforcement of the federal narcotics laws.") (citation omitted).

D. Respondent's Arguments On The Merits Provide No Reason For Denying Certiorari. Respondent's effort to defend the merits of "*Vallejo*'s general rule" fares no better than the reasoning of the Ninth Circuit in adopting and applying that rule. Br. in Opp. 15, 20-27. As the government has explained (Pet. 10-15), the Ninth Circuit's categorical prohibition on admission of the type of expert testimony at issue conflicts with both a textual and common-sense reading of the Federal Rules of Evidence and overrides the traditionally broad discretion that trial courts enjoy in admitting evidence. In particular, respondent errs in suggesting that *Old Chief* v. *United States*, 519 U.S. 172 (1997), "supports the Court of Appeals' decision" in this case. Br. in Opp.

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admitted when government sought to use evidence *not* as "purely background material," but instead "to establish the defendant's guilt by showing that he has the same characteristics as a drug courier"), cert. denied, 498 U.S. 1052 (1991).

25; see *id.* at 27. *Old Chief* provides no support for the *Vallejo* rule; to the contrary, it only casts further doubt on that rule. See Pet. 14-15. In any event, respondent's arguments on the merits are premature at this stage and provide no basis for denying certiorari.

E. The Question Presented Is Demonstrably Important. Finally, respondent states that the government's concern (see Pet. 20) over the impact of "*Vallejo*'s general rule" (Pet. App. 6a) on the administration of justice is unfounded. Br. in Opp. 35. But the number of convictions—including those in this case—that already have been invalidated by the Ninth Circuit under *Vallejo* proves just the opposite. See Pet. 9. Simple drug-importation prosecutions analogous to the prosecution in this case recur continuously—indeed, well more than a thousand times a year—in the Southern District of California and the District of Arizona. This Court should grant review and decide whether the admission of the expert testimony at issue is, as the Ninth Circuit has categorically held, proscribed by the Federal Rules of Evidence.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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